No. 91-184

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT LEE WATKINS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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July 3, 1991

QUESTIONS PRESENTED

The material facts evidenced in the Appendix establish conclusively that Petitioner's prosecution for "aiding and abetting" the alleged "perjury" of a civil deposition witness was the product of a secret conspiracy between two federal district judges, one of whom acted as accuser and the other as Petitioner's trial judge. Through a series of originally concealed, secret *ex parte* "in-chambers conferences" and "oral communications" (App. 38) between the judges which were not discovered and admitted until ***after*** Petitioner's conviction, the judges' conspiracy, which began long before Petitioner was even indicted having finally succeeded. The known material facts being undisputed through the judges eventual admissions, this Petition presents the following questions of law:

1. Can the judges' admittedly secret, *ex parte* "in-chambers conferences" and "oral communications" about procuring Petitioner's prosecution and conviction be excused as "not extrajudicial" or "judicially acquired" information for purposes of the bias and prejudice recusal ***exception*** to 28 U.S.C. §§ 144 and 455 simply because the judges' secret, *ex parte* communications about Petitioner concerned legal matters eventually brought before Petitioner's trial judge after Petitioner's indictment?

2. Can two federal district judges, one acting as accuser and the other acting as the accuser's advisor and Petitioner's trial judge, engage in the following concerted conduct -- i.e., (a) engage in secret, *ex parte* "in-chambers conferences" and "oral communication", with the object of procuring Petitioner's investigation, indictment, prosecution and conviction; (b) thereafter conceal such communications in denying Petitioner's ***pre-trial*** recusal motion under Section 455(a) based on other evidence; (c) subsequently misrepresent and lie to defense counsel in claiming no *ex parte* acquired knowledge about Petitioner; (d) subsequently deny Petitioner's ***post-trial*** recusal motion under 28 U.S.C. §§ 455(a) ***and 144***, while admitting for the first time the judges' *ex parte* communications about Petitioner but excusing such contacts as "not extrajudicial" and (e) therefore absolutely refuse to disclose voluntarily all material facts and thwart all efforts of defense counsel to discover the full extent and subjectmatter of all information exchanged between the judges -- without having vio-

lated the Fifth Amendment to the Constitution of the United States, 28 U.S.C. §§ 144 and 455. Judicial Cannons 1, 2, 3A(4) and 3 C(1), the omnibus clause of 18 U.S.C. § 1503 (obstruction of justice), and, at a minimum, committed acts prejudicial to "the effective and expeditious administration of justice" within the meaning of 28 U.S.C. § 372(c)(1)?

3. Should not a district judge's secret participation in procuring a defendant's indictment and subsequent wilful concealment, non-disclosure, lying to defense counsel, and concerted refusal to respond to lawful, written interrogations not violative of the "mental process rule" constitute *per se* objective facts upon which any judge's "impartiality might reasonably be questioned" as a matter of law under Judicial Canons 3A(4) and 3C(1) and 28 U.S.C. §§ 144 and 455(a) & (b)(1)?

4. Should not the undisputed conduct of the judges toward Petitioner raise a "conclusive presumption of disqualification" and irrebuttable presumption of prejudice to Petitioner's constitutional and statutory rights so as to require reversal as a matter of law and the grant of a new trial to Petitioner before an impartial tribunal?

5. It is within the discretion and "judicial administrative function" of federal judges to evade disclosure of material facts relevant to any disqualification motion and to place themselves above the law not only withholding full disclosure of all material facts, but even worse, treating with disdain and refusing to answer all lawful efforts at discovery which would precipitate disclosure and compel disqualification?

6. Finally as to the purported "materiality" of the false civil deposition testimony which Petitioner allegedly "induced, aided, and abetted", civil testimony which the court had to have held incompetent, immaterial, and of "no consequence" as a matter of law in order to grant summary judgment under Federal Rule of Civil Procedure 56 (c), ever satisfy the "materiality" element of perjury under 18 U.S.C. § 1623? By what stretch of the imagination can the same testimony disregarded and held immaterial as a matter law under a civil summary judgment be said to be "material" as a matter of law under a civil perjury prosecution when the testimony indisputably

did not have and could not have had by its nature any effect upon the summary judgment outcome of the civil proceeding? If there are to be two standards of "materiality" -- one civil and one criminal - then where is the line to be drawn between testimony sufficiently immaterial as a matter law to grant summary yet sufficiently "material" as a matter of law to support a perjury indictment? If no such distinction exists is not Petitioner under the terms of his accuser's own final, unappealed, summary judgement order in Tarbutton, entitled as a matter of law to reversal and remand for entry of a judgment of acquittal?

RULE 14(b) STATEMENT

Charles E. Williams, who was Petitioner's co-defendant below, is neither a petitioner nor respondant herein.[10]

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[10] RULE 29.1 STATEMENT OF RECUSAL DATA

A. PETITIONER'S BACKGROUND

The focus of Judge Owens' and Fitzpatrick's misconduct below has been Petitioner, a successful black businessman with no prior criminal record, who though not a lawyer, has acted as appointed attorney-in-fact under powers of attorney for numerous black families scattered all over the United States in numerous civil fraud cases seeking the recovery of extremely valuable "kaolin" mineral rights from four of the six corporations controlling Georgia's "kaolin" industry.

B. RELATED LITIGATION

Petitioner, for approximately the last seven years, has been the chief protagonist of Georgia's billion dollar "kaolin" industry in numerous, previous and still-pending fraud cases against Georgia-based kaolin companies, which litigation has already cost certain defendants millions of dollars in cases merely ***settled*** to date.

C. RECUSAL INFORMATION

The six largest kaolin companies in Georgia, which comprise the membership of the China Clay Producers Association, have all engaged in similar patterns and practices which enabled such companies to defraud thousands of middle-Georgia landowners out of crude kaolin reserves worth hundreds of millions of dollars. In reality these six companies and their multi-national parent corporations comprise a cartel, the members of which produce and control more than approximately eighty percent of the entire world's annual consumption of kaolin paper coatings, paper fillers and kaolin for ceramic applications. Kaolin reserves mined and processed by these six companies in Georgia alone account for approximately sixty percent of the entire world's annual output of refined kaolin products.

The cartel consist of ECC-America, Inc. (formerly Anglo-American Clays Corporation, a wholly-owned subsidiary of English China Clays, Ltd.; Engelhard Corporation, in which a controlling interest is held ultimately by a holding company of the DeBeers diamond syndicate, Georgia Kaolin Company, J. M. Huber Corporation; Nord Kaolin Company and Thiele Kaolin Company. All of these companies, although not direct parties to Petitioner's criminal case below have a substantial indirect interest in Petitioner's conviction since it serves to prevent Petitioner from assisting in the investigation and filing of civil fraud litigation against the cartel's members.

D. RELATED INVESTIGATIONS

Under Judicial Misconduct Complaint No. 90-2132 now pending before a Special Committee of the Eleventh Circuit Judicial Council, one of the cartel's members, Nord Kaolin Company, stands charged with having paid Judge Fitzpatrick an $80,000 bribe in January of 1988, presumably to influence kaolin cases then pending before Judge Fitzpatrick, including McLendon, *infra*, and presumably to obtain Judge Fitzpatrick's assistance in procuring the prosecution and conviction of the cartel's principal nemesis in hopes of crippling for a long time Petitioner's efforts to assist black landowners recover millions of dollars in mineral rights acquired by fraud.

The seriousness of Judges Owens' and Fitzpatrick's misconduct detailed, *infra*, is reflected in the fact that the Eleventh Circuit Judicial Council, acting through Chief Judge Gerald B. Tjoflat under 28 U.S.C. § 372(c)(1) (App. 46-54) has found probable cause, appointed a Special Committee, and retained private independent counsel who recently filed on May 21, 1991, their initial report pursuant to a seven-month investigation. Not since the handling of the judicial misconduct complaint against former District Judge Alcee Hastings has the Eleventh Circuit Judicial Council expended the effort and expense which has been devoted to investigating the misconduct of Judge Owens and Fitzpatrick, only a small portion of which is detailed herein.

Another related proceeding presently under way is the independent investigation launched by the Public Integrity Section of the Criminal Division of the Department of Justice concerning whether Judge Owens' and Fitzpatrick's conduct constitute violations of federal criminal bribery, obstruction of justice, and conflict of interest statues. This is the same section of Criminal Division which has just obtained the bribery conviction of U.S. District Judge Robert Collins, who was the subject of this Court's Liljeberg decision, *infra*.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT LEE WATKINS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Robert Lee Watkins, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reproduced at Appendix pages 40-43 of the separate Appendix. The oral rulings and written opinion of the United States District Court for the Middle District of Georgia, Macon Division, denying Petitioner's ***pre-trial*** 28 U.S.C. § 455(a) recusal motion and ***post-trial*** 28 U.S.C. § 455(a) and 144 recusal and new trial motions are respectively reproduced at Appendix pages 5-9 and 34-39.

JURISDICTION

The Eleventh Circuit's rendered its opinion (App. 40-43)) on December 7, 1990. A timely Petition for Rehearing and Suggestion of Rehearing En Banc (App. 44) was denied April 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED[1]

I. AS TO DUE PROCESS AND DISQUALIFICATION ISSUES:

A. Fifth Amendment to the Constitution of the United States of America:

> No personal shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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[1] Unless otherwise indicated, all emphasis supplied by boldface , italics, or underlined text is that of Petitioner's counsel.

B. 28 U.S.C. § 144; Bias or Prejudice of Judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, ***such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.*** The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

C. 28 U.S.C. § 455 (a) & (b)(1); Disqualification of Justice, Judge, or Magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his ***impartiality might reasonably be questioned.***

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, ***or personal knowledge of disputed evidentiary facts concerning the proceeding.***

D. Code of Judicial Conduct for United States Judges reported at 69 F.R.D. 273, including relevant Commentary and official Reporter's Notes.[2]

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[2] E. Thode, *Reporter's Notes to Code of Judicial Conduct* (1973).

1. CANON 1

A judge should uphold the integrity and independence of the judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. *The provisions of this Code should be construed and applied to further that objective.*

2. CANON 2

A judge should avoid impropriety and the appearance of impropriety in all his activities

A. *A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.*

B. *A judge should not allow his family, social, or other relationships*[3] *to influence his judicial conduct or judgement.* He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

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[3] Does not the term "other relationships" particularly encompass the undoubtedly pursuasive and indubitably influential *ex parte* communications of a fellow United States District Judge sitting within the same district, division and courthouse?

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. ***A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny.*** He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

3. CANON 3A(4)

A judge should perform the duties of his office impartially and diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative responsibilities

* * *

(4) ***A judge should*** accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, ***neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.*** A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him ***IF he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.***

Commentary

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are ***NOT participants in the proceeding***[4], except to the limited extent permitted. ***It does not preclude a judge from consulting with other judges***[5], or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief amicus curiae.

4. Reporters Note to Canon 3A(4)[6]

A judge receiving a communication about a proceeding that is not before him[7] should, however, be aware that if the proceeding does come before him in the future, any present communication about the proceeding ***must*** require his disqualification at that future point by reason of Canon 3C(1), which provides: A judge should disqualify himself in a proceeding in which his impartiality might reasonable be questioned...". A judge who has therefore given advice about the issues in a proceeding has put his impartiality in jeopardy.

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[4] Does not the term "participants" particularly include United States District Judge Fitzpatrick, the accusing witness who first initiated, in concert with Petitioner's trial judge, the investigation, indictment, prosecution and conviction of Petitioner?

[5] Subject to the *ex parte* communication prohibition of Canon 3A(4).

[6] E. Thode, Reporter's Notes to Code of Judicial Conduct 53 (1973) (emphasis in original).

[7] Transcript excerpts in the appendix conclusively demonstrate that the ex parte "oral communications" and "in-chambers conferences" (App. 37-38) between Judge Fitzpatrick (Petitioner's accuser) and Judge Owens (Judge Fitzpatrick's "advisor" and Petitioner's trial judge)

5. CANON 3(B)

B. Administrative Responsibilities

* * *

6. Canon 3C(1)

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

C. Disqualification

(1) A judge ***shall*** disqualify himself in a proceeding in which his ***impartiality might reasonably be questioned,*** including but not limited to instances where;

(a) he has a personal bias or prejudice concerning a party, or ***personal knowledge of disputed evidentiary facts concerning the proceeding;***

Footnote 7 continued:

began sometime ***prior*** to September 29, 1987 (App. 1-2) long ***before*** the first grand jury ***no-billed*** the first presentment against Petitioner on February 9, 1988, and Petitioner's ***eventual*** indictment on April 27, 1989, pursuant to a second presentment to a different grand jury.

The record, therefore, shows that there was no proceeding whatsoever pending against Petitioner when Judge Owens and Fitzpatrick started their "Star Chamber" proceeding against Petitioner.

More importantly, both Judges Fitzpatrick and Owens knew to a certainty when they initiated and entertained their *ex parte* communications about Petitioner that with themselves sitting as the only two district judges in the Macon Division of the Middle District of Georgia, and Judge Fitzpatrick being Petitioner's accuser, that Petitioner's case would be assigned automatically to Judge Owens for trial.

II. AS TO IMMATERIALITY OF "PERJURED" TESTIMONY:

A. 18 U.S.C. § 2; Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

B. 18 U.S.C. § 1623; False Declarations Before Grand Jury or Court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false ***MATERIAL*** declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if -

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[8] Petitioner was ***not tried*** for having given false testimony himself, but rather for having purportedly induced, aided and abetted the allegedly "purjured", but immaterial deposition testimony of a witness named Charles E. Williams.

(1) each declaration was ***MATERIAL*** *to the point in question* and

(2) each declaration was made within the period of the statue of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations ***MATERIAL*** *to the point in question* in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

C. Federal Rule of Civil Procedure 56(c)

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. *The judgment sought shall be rendered forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, whos that *there is a genuine issue as to any MATERIAL fact* and that the moving party is entitled to a judgment *as a matter of law*.[9]

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[9] The significance of F.R. Civ. P. 56(c) to this *criminal* case lies in Judge Fitzpatrick's (Petitioner's accuser) holding as a matter of law in granting the plaintiff summary judgment in Tarbutton v. All That Tract of Land, 641 F. Supp. 521 (M.D. Ga. 1986), the civil quiet-title proceeding in which Petitioner allegedly induced, aided, and abetted the purportedly "perjured" deposition testimony of one Charles A. Williams. In granting the plaintiff summary judgment, Judge Fitzpatrick held that Charles E. Williams' testimony was incompetent and immaterial as a matter of law. Indeed, Judge Fitzpatrick expressly held as follows:

Footnote 9 Continued -

(1) that the Tarbutton case could be decided as a matter of law ***[w]ithout the testimony of this Charles E. Williams***..." (Id. at 529);

(2) that the summary judgment "motions before the court can be decided ***without reaching the factual issues surrounding the Esther Scott*** deed [to which Charles E. Williams' testimony solely related] ..." (Id. at 525);

(3) that the Court's disregarding the testimony of Charles E. Williams, and even Esther Scott herself, as to the questioned Scott deed was "***of no consequence*** because the doctrine of laches bars Esther Scott Hinton from now claiming, some 45 years after the recording of a deed with her signature, that the signature is a forgery"; and

(4) that under Georgia's doctrine of title by prescription even "***[a]ssuming*** that the Esther Scott deed was ***forged*** ... ***[e]ven a forged deed can serve as color of title*** [for purposes of title by prescription]. "(Id. at 529) (emphasis added in all subparagraphs).

STATEMENT OF THE CASE

Petitioner, a 45-year old black citizen with no prior criminal record, is a successful building contractor and developer and operator of "personal care homes" for elderly residents. Petitioner appeals from the final judgment of conviction and a sentence to five years' imprisonment and a $50,000.00 fine under 18 U.S.C. §§ 2 & 1623 for purportedly aiding, abetting, counseling, and procuring the false declarations of one Charles E. Williams in a civil quiet-title proceeding known as Tarbutton v. All That Tract of Land, 641 F. Supp. 521 (M.D. Ga. 1986). In August of 1986, Judge Duross Fitzpatrick had ***held as a matter of law*** in a final, unappealed summary judgment order that the testimony of Williams was incompetent as a matter of law (Id. at 528) and "of no consequence" to the laches, statute of limitations, and title-by-prescription bases upon which Judge Fitzpatrick granted summary judgment. (Id. at 529).

A year after granting summary judgment in Tarbutton, sometime prior to September 29, 1987 (App. 1-3), Judge Fitzpatrick secretly conferred "with another judge" about the circumstance of Watkins' involvement in Tarbutton (App. 1) and almost two years later subsequently admitted having instigated the investigation and indictment of Watkins, but not Charles E. Williams! (App. 11).

The fact that Judge Fitzpatrick had conferred "with another judge" in procuring Petitioner's investigation and indictment was not discovered until late January of 1990, some two weeks after Watkins' conviction on January 10, 1990.

Thus, Judge Fitzpatrick's ***preindictment*** communications, much less the other "in-chambers conferences" and "oral communications" (App. 37-38) concealed by but ultimately confessed by Judge Owens on March 20, 1990 (App. 17-33), were totally unknown to defense counsel when Petitioner's ***pre-trial*** disqualification under 28 U.S.C. § 455(a) was orally denied by Judge Owens on November 1, 1989. (App. 8). Judge Owens, having previously concealed his secret preindictment conference, did not even finally admit being the "other judge" with whom Judge Fitzpatrick had conferred about Petitioner's investigation and indictment until March 20, 1990 (App. 28).

Judge Owens denied Petitioner an appeal bond, denied Petitioner a voluntary surrender and ordered Petitioner taken into custody at his sentending hearing. Eleventh Circuit Judges Clark, Anderson and Edmondson however, granted Petitioner's appeal bond motion had he was released from custody on June 15, 1990 after some eleven weeks' imprisonment starting with his sentencing on March 23, 1990.

Judges Kravitch, Anderson, and United States District Judge Seybourn Lynne, heard oral argument on November 26, 1990. The panel issued its per curiam opinion (App. 40-42) affirming Watkins' conviction only eleven days later on December 7, 1990. The two-page opinion focused exclusively on 28 U.S.C. § 144 and ***TOTALLY IGNORED*** both of Petitioner's disqualification motions under 28 U.S.C. § 455(a) and Judicial Canons 3A(4) and 3C(1). Indeed, the only statute the Opinion cites at all is 28 U.S.C. § 144. The Opinion considers only whether any "bias and prejudice" of Judge Owens had been "extra-judicially" acquired. ***The Opinion is devoid of any citations to 28 U.S.C. § 455(a) an Canons 3A(4) and 3C(1) and any consideration of whether Judge Owens' "impartiality might reasonably questioned" based upon his secret, ex parte communications and subsequent concealment thereof.*** (App. 40-42).

Twice referring to the *ex parte* "in-chambers conferences" and "oral communications" about Petitioner (App. 37-38) indisputably held between Judge Owens and Fitzpatrick as an "alleged" conference (App. 41-42), and purportedly granting "all reasonable inferences favorable to appellant" (App. 42) with respect to such *ex parte* contacts, the Panel held that all of the information acquired by Judge Owens from Judge Fitzpatrick was received "in his judicial capacity and not in an extra-judicial capacity." (App. 42).

The panel's incredible Opinion never addressed Petitioner's proof that Judge Owens' ***undisputed ex parte*** contacts with Judge Fitzpatrick both before and after Petitioner's indictment violated the *ex parte* communications prohibitions of Judicial Canon 3A(4). The panel ***never questioned at all*** Judge Owens' undisputed course of conduct in concealing, evading, and refusing (to this good day) to disclose the full extent and nature of all of his *ex parte* communications with Judge Fitzpatrick, either voluntarily in hearings or orders or in response to Petitioner's interrogatories.

The panel never even questioned whether Judge Owens' still secret *ex parte* communications and concealing conduct raises not merely the inference but rather a conclusive presumption that Judge Owens' "impartiality might reasonably be questioned" under Judicial Cannons 3A(4) and 3C(1) and 28 U.S.C. § 455(a). The panel's Opinion virtually mimics Judge Owens' Order of March 23, 1990, denying Petitioner's post-trial recusal and new trial motion. (App. 34-39). And most insidiously, the panel's Opinion totally avoids the very same disqualification issues arising under 28 U.S.C. § 455(a) and Judicial Canons 3A(4) and 3C(1) which Judge Owens himself avoided completely (App. 34-38) because he knew that the answers thereto guaranteed Petitioner at a minimum, reversal of Petitioner's conviction, thereby denying to Judges Owens and Fitzpatrick the fruits of their concerted efforts through their almost two and one-half year conspiracy seeking Petitioner's conviction.

After the denial on April 4, 1990, of Petitioner's timely filed Petition for Rehearing and Suggestion of Rehearing En Banc, as well as Petitioner's motion to stay issuance of the mandate, the panel's Opinion of December 7, 1990, issued as the mandate of the Eleventh Circuit on April 16, 1991. Petitioner's subsequent motion for voluntary surrender was granted and Petitioner timely reported to the minimum security Federal prison camp at Jesup, Georgia on May 20, 1991, where he remains imprisoned as of the filing of this Petition on July 3, 1991.

Petitioner timely filed an application for an indefinite, or alternatively a 60-day extension of his certiorari deadline from July 3, 1991 to September 3, 1991. Petitioner's counsel received notice on June 26, 1991 of Justice Kennedy's denial of the extension application. The extension had been sought primarily to enable the Special Committee and/or the Eleventh Circuit Judicial Council to take further action upon the report of independent counsel filed May 21, 1991, respecting a seven-month investigation launched pursuant to Judicial Misconduct Complaint No. 90-2132 filed by Petitioner's counsel on July 20, 1990, against Judge Owens and Fitzpatrick, the outcome of which should have a substantial bearing upon Petitioner's certiorari petition.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT, OTHER CIRCUITS, AND OTHER DECISIONS OF THE ELEVENTH CIRCUIT AND REFLECTS SUCH An APPALLING INSENSITIVITY TO FUNDAMENTAL NOTIONS OF DUE PROCESS AND FAIRNESS THAT THE INTERVENTION AND TEACHING OF THIS COURT APPEARS NECESSARY TO CLARIFY AND CUB ABUSE OF THE "NOT EXTRAJUDICIAL" EXCEPTION TO 28 U.S.C. § 144 AND 455(a) & (b).

The objective, undisputed facts summarized herein respecting Judges Owens' and Fitzpatrick's conduct towards Petitioner, which facts represent only the "tip of the iceberg" in comparison to all the other facts presently under investigation by the Eleventh Circuit Judicial Council, would seem clearly to be answerable with but three words -- **RES IPSA LOCQUITUR**. Yet the Eleventh Circuit has inexplicably turned it back upon this Court's *Liljeberg* decision[10], clear Eleventh Circuit precedent pre-dating and postdating Liljeberg[11], and numerous persuasive precedents from other circuits[12]. Apparently the "thing" does not speak clearly enough for the panel nor for the entire Eleventh Circuit en banc to see the "thing" for what it is.

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[10] *Liljeberg v. Health Services Acqusition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed2d 855 (1988).

[11] *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989); *Parker v. Connors Steel Co.*, 855 F.2d 510 (11th Cir. 1988); *In re Paradyne Corp.*, 803 F.2d 604 (11th Cir. 1986); United States v. Adams, 785 F.2d 917, 920 (11th Cir. 1986) and *United States v. Hangar One, Inc.*, No. 75-3654 (5th Cir. September 29, 1977) (available on LEXIS).

[12] E.g. *United States v. Earley*, 746 F.2d 412 (8th Cir. 1984); *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F2d 444 (6th Cir. 1980); *Standard Alliance Industries v. Clawson Co.*, 5876 F.2d. 813, 828 (6th Cir. 1979); *Rhinehart v. Brewer*, 561 F.2d 126 (8th Cir. 1977); *Kennedy v. Great Atlantic & Pacific Tea Co.*, 551 F.2d 593 (5th Cir. 1977); *Greco v. Meachum*, 533 F.2d 713, 719 (1st Cir. 1976); Davis v. Bd. of School Comm., 517 F.2d 1044, 1052 (5th Cir. 1975); Heller v. Robbins, 409 F.2d 857 (1st Cir. 1969).

The Eleventh Circuit's sole approach to the material undisputed fact of the judges' secret *ex parte* contacts was to categorize all information exchanged as "not extrajudicially" acquired merely because the information was exchanged between judges. While this disqualification exception finds it source in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), other circuits have recognized that it is not sufficient to label the communication "not extrajudicial" simply because it related to a matter before the judge. *United States v. Earley*, 766 F. 2d, 412, 416 (8th Cir. 1984). The Sixth Circuit has adopted the approach that "[s]ome conduct is so inimical to the fair and impartial administration of justice, however, that the presumption of prejudice arising therefore is conclusive and requires an automatic reversal." *Price Brothers Co. v. Philadelphia Gear Corp.*, 629 F.2d 444, 446 (6th Cir. 1980). Indeed Eleventh Circuit Judges Kravitch and Anderson said as much themselves in *In re Paradyne Corp.*, 903 F.2d 604, 612 (11th Cir. 1986, less than five years ago[13] but the same two judges on Petition panel (App. 40) turn their back upon the prior Paradyne rationale and totally ignored the same consideration in deciding Petitioner's appeal. Why the double-standard for Petitioner? Some circuits, including the Eleventh Circuit have even recognized and applied Judicial Cannon 3A(4)'s prohibitions to *ex parte* communications. *Price Brothers Co., supra* at 427; *In re Paradyne Corp.*, 903 F. 2d 604, 612 (11th Cir. 1986).

[13] *Paradyne, supra,* held in our view, this unprecedented program of *in camera, ex parte* inquisitions is so clearly at odds with the principles of the open, adversarial system of justice guaranteed by our Constitution that the district court's contemplated actions without question endanger the defendants' rishts. See in re Taylor, 567 F.2d 1183, 1187-88 (2nd Cir. 1977).

Id. at 608

* * *

In addition to asking that this court prohibit the hearings as contemplated by the district court, petitioners also seek to obtain tanscripts of an *ex parte* resentation made to the district court by the government in support of its motion to disqualify. We agree with petitioners that due process requires that they have access to the transcript.

Unfortunately none of these decisions have addressed the disqualifying effects of *ex parte* communications between fellow judges nor reconciled Canon 3A(4)'s commentary stating that it "does not preclude a judge from consulting with other judges" with the less well known Reporter's Notes evidencing the drafter's intent that the judge "must" disqualify himself if a matter previously discussed with another judge does come before the judge, who by giving his prior advice has placed his "impartiality in jeopardy." (CSEE see full quote at page 6 *supra*).

Although Petitioner's situation may arise infrequently[14], this Court has not hesitated to address rare situations which may seldom occur when the potential for prejudice to fundamental concepts of due process and fairness are so great as to demand the intervention of this Court.

Footnote 13 continued:

Although *ex parte* conferences are not *per se* unconstitutional, they "should occur but rarely, epecially in criminal cases." *United States v. Adams*, 785 F.2d 917, 920 (11th Cir. 1986); see also Code of Judicial Conduct for United States Judges, Canon 3(A)(4) ("A judge should ... neither initiate nor consider *ex parte* communications concerning a pending or impending proceeding."). *Ex parte* communications generally are disfayored because they conflict with a fundamental precept of our system of justice: a fair hearing requires "a reasonable opportunity to know the claims of the opposing party and to meet them." Morgan v. United States, 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129 (1938).
Id. at 612.

[14] In fact, the Reporter's Notes to the Code of Judicial Conduct indicate that the drafters found that consultations between judges were not "infrequent or hypothetical situations."

> The drafting of the appropriate standard regulating *ex parte* communications proved to be difficult. In an adversary proceeding, *ex parte* communications by the judge to a party or his lawyer or by a party or his lawyer to the judge clearly should be precluded. The more difficult questions concerned such transactions as a telephone call by the judge to a law

Footnote 14 continued:

> professor to obtain advice on a contested issue within the area of the professor's expertise, or concultation by the judge with another judge not on the same panel or the same court. These are not infrequent or hypothetical situations - the Committe was informed of many such communications. See the discussion of the controversy between Judges Frank and Clark over these very issues in the recent book by Marvin Schick, *Learned Hand's Court* (The Johns Hopkins Press, 1970), and Cchick's article, *Judicial Relations on the Second Circuit, 1941-1951*, 44 N.Y.U.L. Rev. 938, 941-947 (1969). The Committee concluded that unless the *ex parte* communication is authorized by law - statute, common law, and rule being the principa methods of authorization - the Communication should be prohibited Communications between judges and between the judge and court personnel whose function is to aid the judge in carrying out his adjudicative duties were recognized by the Committee as failling with the "authorized by law" provision.

E. Thod, *Reporter's Notes to Code of Judicial Conduct* 53 (1973).

The closest case which Petitioner's counsel has found which is factually analogous to Petitioner's plight at the hands of Judge Owens and Fitzpatrick is a Florida Supreme Court decision removing from office a circuit judge who's *inter alia*, engaged in *ex parte* communications with a fellow circuit judge related to the disposition of a criminal case. *In re Leon*, 440 So. 2d 1267 (Fla. 1982). Equally illustrative of the stringency with which Canon 3A(4) is enforced at least in Florida is The Florida Bar v. McCain, 361 S. 2d 700 (Fla. 1978) in which the Supreme Court of Florida subsequently disbarred a former fellow supreme court justice who resigned in the face of charges that he had in at least two instances violated Canon 3A(4) in *ex parte* contacts with lower court judges attempting to influence their decisions. Id. at 702-03.

Ultimately, therefore, the issue which begs for clarification by this Court is not the propriety of communications among judges *per se* but rather the clear disqualifying effect of prior communications **IF AND WHEN** the pending or impending matter discussed, be it civil or criminal, later comes before one of the judges for trial.

II. THE ELEVENTH CIRCUIT HAS SO FAR DEPARTED FROM FUNDAMENTAL STANDARDS OF DUE PROCESS AND FAIRNESSS AND HAS VIRTUALLY SANCTIONED THE UNDISPUTED MISCONDUCT OF TWO DISTRICT JUDGES IN VIOLATION OF JUDICIAL CANON 3A(4) SUCH THAT PROTECTION OF THE INTEGRITY OF THE FEDERAL JUDICIARY AND THE PUBLIC'S CONFIDENCE THEREIN CALLS IMPERATIVELY FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

At stake is Petitioner's fundamental right to be accorded due process of law before an impartial tribunal under the Fifth Amendment of the Bill of Rights. In this year in which this Nation begins its third century under the Bill of Rights, it cannot be denied that such rights, practically speaking, exist only to the extent of a citizen's ability to enforce such rights in a court of law. For the enforcement of his rights, the judicial branch is exclusively the citizen's forum of first and last resort.

"Upon the integrity, wisdom and independence of the judiciary depend the sacred rights of free men." So states the motto deeply etched into the cold Georgia marble above the bench of the Court of Appeals of Georgia. But as the undisputed judicial misconduct of two federal judges in the case at hand clearly, and all too graphically demonstrates, if integrity is lacking then wisdom and independence count for naught.

Less than three years ago this Court eloquently explained in *Liljeberg* the importance of stringent enforcement of the disqualification statutes to the actual integrity of the federal judiciary and the public's perception thereof and confidence therein. For whatever reasons, it would appear that the lessons of *Liljeberg* "didn't take" in the Middle District of Georgia, nor, more importantly, in the Eleventh Circuit.

It may be true that no declaration of this Court could have immunized Petitioner from the conspiracy of two corrupt federal judges bent upon silencing Petitioner's efforts to get simple justice for a lot of poor black families who like the Ute Indians in *Affiliated Ute Citizens v. United States* 140 U.S. 128 (1972), simply seek to recover fair value for their underground mineral reserves. But even a *per curiam* decision of this Court exploding the myth advanced by Judge Owens and the Eleventh Circuit that all communication between judges, expecially those in violation of the *ex parte* prohibition of Canon 3A(4), are non-disqualifying because they are "not extrajudical" (App. 38; App. 42) would at least serve to deter once and for all a repetition of the judicial mayhem which Judge Owens' and Fitzpatrick's "Star Chamber" tactics have visited upon Petitioner and God only knows how many other hapless parties in the Middle District of Georgia.

Petitioner respectfully suggests that what the Eleventh Circuit's opinion virtually requires is a revisitation and extension of *Liljeberg* in which construction of the Judicial Canons, particularly Canon 3A(4), is reconciled with the recusal standards of 28 U.S.C. § 144 and 455. Canon 1 of the Code of Judicial Conduct indeed requires that the "provisions of this Code should be construed and applied to further [Canon1's] objective "of upholding the integrity and independence of the judiciary".

Counsel does not presume to argue the duty of this Court under the discretionary standard of review under writs of cerfiorari but beyond declaring the supreme law of the land it should not be forgotten that each Justice, as does every member of the federal judiciary, has an individual obligation under Canon 3B(3), supra at 7, to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

In filing a judicial misconduct complaint against Judges Owens and Fitzpatrick and invoking the judicial disciplinary procedures of 28 U.S.C. § 372(c), Petitioner's counsel has done all he can under his own obligations under Directory Rule 1-103(B) of Georgia's Code of Professional Responsibility to remedy the incredible conspiracy of two corrupt federal judges against Petitioner. Although the Judicial Coucil of the Eleventh Circuit may eventually issue finding which would compel at least a new trial for Petitioner, or perhaps a judgment of acquittal on remand, proceedings under Section 372 (C) are ponderously slow at best. In the interim, therefore, the only certain remedy available to Petitioner is this Court's swift and certain exercise of its powers of supervision through, at a minimum, *per curiam* reversal o the Eleventh Circuit's Opinion in light of the material undisputed facts presented in Petitioner's Appendix.

CONCLUSION

Counsel for Petitioner respectfully prays that Petitioner's petition for a writ of certorari be granted even if only for purposes of a summary reversal of the errors of law apparent on the face of the Eleventh Circuit's Opinion.

FRANKLIN R. NIX
1020 Foxcroft Road, N.W.
Atlanta, Georgia 30327-2624
(404) 231-8783

Counsel for Petitioner

July 3, 1991

91-184

(2)

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBERT LEE WATKINS,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX

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July 3, 1991

APPENDIX
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COUNCEL'S NOTE: Unless otherwise indicated, all emphasis supplied by boldfacing, italicizing or underlining the text of the following appendices is that of Petitioner's councel.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JUANITA SMITH MCLENDON, et al.)

versus) C. A. NO. 85-338-2-MAC

GEORGIA KAOLIN COMPANY)

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE DUROSS FITZPATRICT (SIC), U. S.

DISTRICT JUDGE MACON, GEORGIA SEPTEMBER 29, 1987

COMMENCING AT 3:00 P.M.

APPEARANCES:

For the Plaintiffs: MS. ROBIN LOEB KURTZMAN

For the Defendant: MR. JOHN B. HARRIS, JR.
MR. WILLIAM C. HARRIS

LINDA A. FARR
UNITED STATES COURT REPORTER
P. O. BOX 264
MACON, GEORGIA 31202-0264

THE COURT: Regarding the McLendon Case, for reasons that I just really can't disclose right now, this case is going to have to go on the shelf for a while. It involves something pending in a related suit. I'm just -- I just feel like I'd just better say we don't -- I just -- I can say no more at this time. I just think we need a stay in the case, something that is -- that relates to this that is involved in another lawsuit and --

MR. JOHN B. HARRIS, JR.: Well, it's not going anywhere.

THE COURT: You can ask me -- if you want to ask me any questions about it, I'll answer what I can, but I -- it's -- I don't know, I mean it's just something that I really feel like that I need to -- Let me say this, it does not involve any of the counsel, it's just a matter that I -- ***I feel after a good deal of thought about it and conference with another judge*** [1] -- I just feel like that it wouldn't be fair to anybody concerned to proceed on with this case at the present, that we just need -- I want to just stay all actions until say a period of six months and then we'll proceed.

---

[1] COUNSEL'S NOTE: The "conference" which Judge Fitzpatrick disclosed on September 29, 1987, having had with "another judge" concerning Petitioner's prosecution was not discovered by defense counsel until shortly ***after*** Petitioner's conviction more than two years later on January 10, 1990. Even after discovery of this conference by defense counsel it took Judge Owens (Petitioner's trial judge) three months to confess to his having been the "other judge" with whom Judge Fitzpatrick had conferred about prosecuting Petitioner. It took the hearing held March 20, 1990 (App. 17-33, *infra*) upon Petitioner's ***post-trial*** recusal and new trial motions to extract the secret identity of the "other judge" from Judge Owens.

MR. JOHN B. HARRIS, JR.: Well, I don't think anybody is going to be prejudiced. It's going to stay right where it is.

THE COURT: Well, that's -- I think it -- I don't see how anybody is going to be prejudiced. After all, the

acts that are alleged in the plaintiff's complaint took place a good many years ago and six more months won't make any difference, but I think it would be to the benefit of all involved here if we just put this case aside until some matters that are pending in another action are completed. And really and truly, quite frankly, that's all I can say about it because I -- this other, I just can't disclose what other actions are in another suit.

MR. JOHN B. HARRIS, JR.: You know, you say, "You're welcome to ask some questions." That's bad to tell a lawyer that.

THE COURT: You can ask the questions. The main thing I want to reassure you is that whatever this other -- ***this matter that is of concern to the Court, great concern to the Court, it doesn't involve any of the counsel.***

MR. JOHN B. HARRIS, JR.: Does it involve any of the parties?

THE COURT: Yes, sir, I knew not to ask a lawyer --

MR. JOHN B. HARRIS, JR.: You knew you --

THE COURT: *It's -- it doesn't -- no, it doesn't involve any of the main parties.*

MR. JOHN B. HARRIS, JR.: The only question that I would like some clarification on -- and I'll be completely guided by the Court on this -- is that when we had the hearing

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA :

VS. : Crim. #89-46 Mac (WDO)

ROBERT L. WATKINS :

CONFERENCE

IN MACON, GEORGIA November 1, 1989

HON. WILBUR D. OWENS, JR., U.S. District Judge, Presiding

APPEARANCES:

For the Government: MR. EDGAR W. ENNIS, JR.
United States Attorney
MR. PAUL McCOMMON
Assistant U. S. Attorney

For the Defendant: MR. CHARLES ERION

FRANCES B. ROQUEMORE, UNITED STATES COURT REPORTER

NOVEMBER 1, 1989, 2:00 P.M., MACON GEORGIA

THE COURT: I thought we'd talk about any problems in your case. ***Of course, on your Motion to Recuse [under 28 U.S.C. 455(a)], as to those motions, they don't bother me.*** My hide's gotten tough enough I think over the years like y'all's but I think the record needs to reflect, of course, that Robert Lee Watkins has been indirectly involved in a series of civil cases which is what you -- the transcript that you've attached to your motion are referring to and the record is complete in those cases. ***But the only knowledge that I have of Robert Lee Watkins in those cases is by virtue of the comments that counsel on both the plaintiffs' and the defendants' side have made to me in the course of my having to rule on motions.*** There was a controversy concerning the taking of Robert Lee Watkins' deposition in those civil cases and the question arose, 'Well, how is there any possible relevant evidence to be gained from deposing Robert Lee Watkins, who's not a named plaintiff or a named defendant?' And it was in that sense that Frank Nix and other counsel advised the Court, I guess maybe Norman and others on the other side did, too, that Mr. Watkins has a written contingent fee contract with the named plaintiffs in those kaolin cases, and that in that capacity, they tell me, he has gone about acting as an investigator and accumulating information and it was on account of that that his deposition was taken. I haven't

read his deposition; I don't even know that it's on file. I've never, to my knowledge, seen Robert Lee Watkins. ***But other than that, all that has come to my attention,*** [2]***of course, is he was indicted, another judge of this court, Duross Fitzpatrick recused himself ([rom McLendon v. Georgia Kaolin Company] and wrote a letter and I inherited the case.*** Then I also got the criminal case because I routinely got that one anyway. But with due respect to your [recusal motion] -- to his contentions to the contrary, ***I know of nothing that would suggest to anybody that I have any personal bias or prejudice about Robert Watkins. Under 455(a), I know of no reason for me to begin recusing myself on this criminal case.***

MR. ERION: Well, we set out our contentions on that in the brief.

THE COURT: Sure. You did and I've read them again, read the Government's response.

MR. ERION: I haven't received that yet.

[2] COUNSEL'S NOTE: The above-quoted underlined passages reflect Judge Owen's ***pre-trial*** lying to defense counsel and ***pre-trial*** concealment of *ex parte* conferences and communications with Judge Fitzpatrick about Petitioner's prosecution which Judge Owens finally confessed (App. 17-33 *infra*) only in the face of Petitioner's post-trial recusal and new trial motions filed after discovery of Judge Fitzpatrick's secret, *ex parte* conferences with "another judge" about prosecuting Petitioner.

MR. McCOMMON: Okay. One copy's in the mail. We just filed that about eleven o'clock.

THE COURT: Well, I just got it.

MR. ERION: Well, if you've got it in the mail, that's fine.

THE COURT: Basically, all he did was write a legal brief and there are no facts in it.

MR. ERION: You understand, Your Honor, our

position on that is not that we content you're actually biased because I assume that if you were, you'd be the first one to say so.

THE COURT: There wouldn't be any question about that.

MR. ERION: ***But the 455(a) goes to what the appearance is and especially with Judge Fitzpatrick's letter having been delivered to you.***

THE COURT: Yeah.

MR. ERION: And I only learned of that very recently.

THE COURT: Oh, you did?

MR. ERION: That had not been filed earlier.

THE COURT: ***Of course, and you know, I realize and I know and the District Attorney can confirm to you that Judge Fitzpatrick was the one who referred the matter to the U.S. Attorney and that caused a Grand Jury to be convened and they decided to indict him, but as far as the evidence surrounding that, I know***

nothing about that[3]. Of course, a Jury's going to decide the question of guilt or innocence; it's not for me to decide whether to believe Robert Watkins or not anybody else.

MR. ERION: Well, I know that but Your Honor makes the rulings on those things and we want to be sure -- you understand?

---

[3] COUNSEL'S NOTE: To this good day Judge Owens and Fitzpatrick have absolutely refused to disclose the substance and extent of their admitted "in-chambers conferences" (App. 37, ln. 1) and "oral communications" (App. 38) about Petitioner beyond admitting their occurrence.

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

JUANITA SMITH McLENDON, ET AL.,	)	
Plaintiffs	)	
	)	Civil Action File
	)	No. 85-338-M-2-MAC (DF)
vs.	)	
GEORGIA KAOLIN COMPANY,	)	
Defendant.	)	

STATUS CONFERENCE

MACON, GEORGIA May 18, 1989

HON. DUROSS FITZPATRICK, U.S. District Judge, Presiding

APPEARANCES:

For the Plaintiff:
HUGH C. WOOD
DWIGHT A. MEREDITH
Wood & Meredith
Decatur, GA 30033-0189

For the Defendant:
JOHN B. HARRIS
WILLIAM C. HARRIS
Harris & Harris
Macon, GA 31208-4866

and I think I entered an order. What was, Mr. Harris, what did we say?

MR. JOHN HARRIS: The order was that you granted the motion to compel in part, and you ordered that the drill logs be delivered to the plaintiffs' counsel, who was then Mr. Ben Garland and Mr. Roy Cowart, and that they be held under the terms of your protective order; that they could be disclosed to the plaintiffs' attorneys and one designated expert, Frank Fountain, and not to the plaintiffs or anybody else connected with the case.

THE COURT: Which includes Mr. Robert Watkins.

MR. JOHN HARRIS: Including Mr. Robert Watkins.

THE COURT: ***I'm going to tell you something. Mr. Watkins has been indicted, you know that --***

MR. MEREDITH: I was aware of that as of recently.

THE COURT: ***-- for involvement in another case involving kaolin, but nothing to do with this case, a different everything, but the deposition that was given in the other case (Tarbutton v. All That Tract of Land) was so outrageous, so patently false, that it made me realize that something wasn't kosher, and I'm the one that asked the U.S. Attorney to look into it.***

MR. MEREDITH: I understand that, that the reason, the indictment was the reason for the stay [of McLendon v. Georgia Kaolin Company; App. A-2, lines. 1-6]

THE COURT: Yes. I will be frank with you, I did not feel comfortable proceeding in any case with as much

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significance as this, with a person [Petitioner Robert Lee Watkins] involved in the litigation who had already shown me, and I'm not, obviously I'm not going to be involved in whatever happens to Mr. Watkins, that is going to be before some other Judge, probably Judge Owens, I'm out of it, but I was just, it went against my sense of propriety to proceed with something like that hanging over it. Now is Mr. Watkins still involved in this case?

MR. MEREDITH: No, sir, he is not.

THE COURT: You can assure me that Mr. Watkins will have nothing at all to do with this case and nothing will --

MR. MEREDITH: Your Honor, I would show you, I read the transcript, it became apparent to me Mr. Watkins was a problem. I spoke to Mr. Watkins and I have asked him to revoke all interest in this case, which he has consented to. I don't have a copy of this for you, but he has revoked all right, title, interest, any powers of attorney or any other authority in this case. Sir, I'm trying to clean up a lawsuit, I'm not trying to mess up one.

THE COURT: Yes, I could tell, when I met you, you all wouldn't tolerate any such.

MR. MEREDITH: On that same line, let me tell you Mr. Wood and I have looked at the complaint, some motions have been filed. Maybe it's the fact I come from a defense attorney background, but at some point one of the attorneys,

* * *

disclose them to nobody other than counsel, Mr. Wood and myself, and prior to the time we disclose them to an expert, we will submit the name of the expert to Mr. Harris and give him five days or ten days, whatever you think is proper, to object, and if he objects to the particular expert we picked, then Your Honor can decide the case, decide that issue. I'm just not sure I want to be locked into prior counsel's selection of an expert at this point.

THE COURT: I don't mind, I feel like that we are now at a different plateau on this case. I don't want to say a new start, but I do feel like that I feel move comfortable with this case, because ***I don't trust Mr. Watkins.***

MR. MEREDITH: Yes, sir.

THE COURT: *One bit.*

MR. MEREDITH: That is clear, Your Honor.

THE COURT: ***I have not trusted him since I first got involved in that other case (Tarbutton v. All That Tract of Land) and realized that somebody was doing something that was not only unethical, but illegal.***[4]

MR. MEREDITH: Of course, Your Honor --

THE COURT: I'm probably saying more about it than I should, but it incensed me because of the fact that the case, the documents were like that, and God knows what went on in that case before I got over here, and Judge Owens did to me what I would do to any other Judge, and pushed it over here and says, "Here." Luckily I got the case before I had

any real heavy caseload. So, you know, I had nothing else really to do except work on the Tarbutton case. So we spent a lot of time on that.

---

[4] COUNSEL'S NOTE: Judge Fitzpatrick deliberately concealed during the entire pendency of Tarbutton his mistrust and bias toward Petitioner, who was a named party-defendant in Tarbutton. He also deliberately concealed from Petitioner's counsel in Tarbutton that the plaintiff's law firm, Jones, Cork & Miller, was ***simultaneously*** representing Judge Fitzpatrick personally as both beneficiary and co-executor in the probate of Judge Fitzpatrick's father's estate. In contrast,at about the same time in at least one other civil case involving the law firm of Jones, Cork & Miller, Judge Fitzpatrick disclosed his conflict and *sua sponte* recused himself from the case.

But what I would like for you and Mr. Harris to do is to just confer together for a few minutes and see what you all can agree on. Why don't we just take about a 10 minute break, you all can confer, tell me what you -- I want the case to move forward, I want it to move forward in, you know, with as much expediency as we can afford and can give you, based on other commitments.

MR. MEREDITH: Yes, sir.

THE COURT: ***But you are right, the case had been stayed and the case should have been over before now.***[5]

---

[5] COUNSEL'S NOTE: McLendon v. Georgia Kaolin Company, which Judge Fitzpatrick stayed pending his procurement of Petitioner's indictment, was stayed a total of twenty months because the grand jury no-billed the first presentment against Petitioner. Indeed the McLendon stay was not lifted until three weeks ***after*** Watkins eventual indictment on April 27, 1989, pursuant to a second presentment made in apparent violation of U.S. Justice Department internal regulations.

> ***Approval required prior to re-submission of same matter to grand jury.***
>
> However, once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (i.e., the same transaction or event and the same putative defendant) should not be presented to another grand jury or presented again to the same grand jury without first securing the approval of the responsible assistant attorney general. Ordinarily such approval will not be given in the absence of additional or newly discovered evidence or a clear circumstance of a miscarriage of justice.
>
> United States Attorney, Title 9 - Criminal Division, code § 9-11.220(A). (Emphasis supplied.)

MR. MEREDITH: Yes, sir. Well, Your Honor --

THE COURT: I'm glad --

MR. JOHN HARRIS: We are going to have to discuss this, Your Honor. It seems to me now, in light of the dead man's statute, because all of these people that I have been reading to you, and the next, the only other claim of fraud is they said that it wasn't worth but $260 an acre, all of those witness' lips are sealed by the dead man's statute.

THE COURT: The only thing I will say to that is, that may be correct, may not be correct, I don't know right now, but I would think this is something I would like to hear form you all specifically by a brief or something like that.

---

[5] COUNSEL'S NOTE: continued

The United States Attorney for the Middle District of Georgia has never proven his having obtained leave to make a second presentment against Petitioner to another grand jury as required by the previous page's quoted Justice Department regulation.

The rules governing the conduct of United States Attorneys are found in the United States Attorneys Manual. The authority, publication and maintenance of the United States Attorneys Manual is prescribed in the Code of Federal Regulations for the Justice Department at 28 CFR 1, subpart D-1, Code § 0.22(b). The manual spells out procedures that United States Attorneys must follow before the same criminal matter once no-billed, may be submitted to a second grand jury.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

MACON DIVISION

UNITED STATES OF AMERICA :

VS. : Crim. #89-46 Mac (WDO)

ROBERT LEE WATKINS :

CONFERENCE

IN MACON, GEORGIA MARCH 20, 1990

HON. WILBUR D. OWENS, JR., U.S. District Judge, Presiding

APPEARANCES:

For the Government: MR. PAUL McCOMMON and

MS. MIRIAM W. DUKE

Assistant U.S. Attorneys

For the Defendant: MR. P. BRUCE KIRWAN

FRANCES B. ROQUEMORE, UNITED STATES COURT REPORTER

MARCH 20, 1990, 2:00 P.M., IN CHAMBERS:

THE COURT: You have been brought aboard in United States vs. Robert Lee Watkins.

MR. KIRWAN: Yes sir, I was retained to really do the appeal and got into this other matter [post-trial recusal and new trial motions] that we filed yesterday.

THE COURT: Well, I guess I have several concerns. First of all, my research indicates that assuming all other requirements are met, that a motion for recusal can't be filed by a new lawyer in the case. I have not looked at that.

MR. KIRWAN: No sir, I haven't. I have not looked at that.

THE COURT: Well, it contemplates when it says, "filed by counsel," that's the original lawyer in the case who has been in the case all along and is still in the case.

MR. KIRWAN: I'm sorry, Your Honor, I'm just not prepared -- I didn't look at that ground.

THE COURT: Well, that's a statutory requirement, it's not a ground for recusal.

MR. KIRWAN: I understand. I'm just saying that I was not aware of that. As I read the statute, I was not aware that --

THE COURT: Well, assuming that wasn't a problem, I've read everything that you have submitted and I don't see anything in here I haven't seen before. It seems to just be

a rehash of what we've done twice already.

MR. KIRWAN: *Your Honor, I think that the only new evidence would be the discovery of the conference where Judge Fitzpatrick indicated he had a conference with another Judge.*

THE COURT: *No, that's nothing new.*

MR. KIRWAN: *Well, that's my understanding of what was -- had never been revealed before as to who was that other Judge.*[6]

THE COURT: *No, it was revealed way back there that he told me at the time that he came to the conclusion that he was going to refer the matter to the Grand Jury, that he was going to do so, and that's what sent the case, the civil cases to me. It was -- every cummunication though, has been between us as Judges. So --*

MR. KIRWAN: That's my understanding, is that that was the new evidence; that was not heretofore been made known, so that was my understanding.

---

[6] COUNSEL'S NOTE: To this good day Judge Owens' claim that he had previously "revealed" his *ex parte* conferences and communications with Judge Fitzpatrick about Petitioner finds no support whatsoever in the record. In fact, the record confirms Judge Owens' absolute ***concealment*** of such communications until his confession in this transcript of the March 20, 1990 hearing upon Petitioner's post-trial recusal and new trial motions in reliance upon 28 U.S.C. §§ 455(a) ***and 144*** and *Liljeberg, supra.*

THE COURT: *Well, let's assume that that was so-called new evidence; what would that demonstrate as far as bias or prejudice?*

MR. KIRWAN: *Well, I think that the affidavit, as I understand that a 144, if the affidavit is facially sufficient, then that would cause the Court to refer it to someone else.*

THE COURT: *Oh, I don't question that, but I*

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question that within the decided cases, that that is an extrajudicial communication that would give me personal bias, anymore than the letters that Duross has sent saying that he was biased. How does that affect me?

MR. KIRWAN: Well, I think if the Court received copies of those letters, then --

THE COURT: I did. Nobody has ever denied that.

MR. KIRWAN: I understand.

THE COURT: He showed copies of letters to everybody.

MR. KIRWAN: I think that the showing of those letters to the Court is not in a "judicial function."

THE COURT: Well, what function is it? Do you think that's his personal function?

MR. KIRWAN: Well, the correspondence between, you know, the Court as to matters that are pending, *I think that it raises the spector of impropriety as to if Judge Fitzpatrick has communicated to you his belief as to Mr. Watkins' dishonesty or whether or not he would believe him as far as he would throw a piano, or something along those lines*, then that --

THE COURT: And he said he would not believe him.

MR. KIRWAN: Yes sir, and *that would taint Your Honor just basically because of those statements along those lines.* Just like the fruit of the poisonous tree, once the

well is poisoned, then it's poisoned for everyone.

THE COURT: *You think that one Judge would base his decision upon another Judge's feelings? You don't seriously suggest that.*

MR. KIRWAN: *No sir, but I think that, as I understand the standard is what an objective layperson would think, if they looked at this, and I think that's what the standard is, and we would ask the Court that it's not so much subjective anymore, but it's what that, you know, the unsophisticated layperson would think based on the transactions, and that's what our position is.*

THE COURT: Well, Bruce, this is exactly the contention that was made before that I've already ruled upon twice; not once but twice.

MR. KIRWAN: Well, this might be a little different angle under 144 instead of 455.

THE COURT: *But how can you, as a lawyer, tell me that this is presented in good faith, if it is nothing more than a rehash?*

MR. KIRWAN: *Well, I don't -- Your Honor, my understanding of the facts is it is not just a rehash; it is more that there was such a conference and that that conference has -- you know, was held and that was not made known to the lawyers before, to the parties before, and that's my understanding. So that's the reason why I think*

it's made in good faith.

THE COURT: And you think the third time around, that's what this statute contemplates, seriously?

MR. KIRWAN: Judge, I just think that based on the circumstances as I inherited it, I think this is made in good faith at this point.

THE COURT: Well, of course, I'm using good faith in the sense of the statute and not you personally. You're just the lawyer, no problem about that. Anyway, as I say, I have looked hard; I don't

see anything in here that's new, to be honest with you. *You term it a "Motion for a New Trial." I don't understand how this is any Motion for a New Trial.*

MR. KIRWAN: *Well, my argument on that, Your Honor, is that if, in fact, that the portion of what we say is newly discovered evidence; that is, that there was a transcript of a conference where Judge Fitzpatrick says he had conferred with another Judge, and that other Judge is unknown or not mentioned in that transcript.*

THE COURT: *Somewhere I know this has been discussed, because as I say, there was never any question that he talked to me and that I therefore knew that he was sending the matter to the Grand Jury.*

MR. KIRWAN: Your Honor, that's not -- my understanding of the facts is a little bit different. I don't know whether that fact has ever been known or not.

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THE COURT: Well, I can't put my finger on what page.

LAW CLERK: It came to light in the Cheeves, Gibson case.[7]

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[7] COUNSEL'S NOTE: Petitioner's presnet counsel is also counsel in the referenced Cheeves and Gibson cases. The record in those cases also conclusively confirms Judge Owens' absolute concealment of his *ex parte* contacts with Judge Fitzpatrick about Petitioner. Indeed, four members of the Bar of this Court, including the undersigned, filed affidavits in the Cheeves and Gibson cases swearing that Judge Owens had never disclosed or admitted prior to March 20, 1990, in Petitioner's case or any civil cases, having conferred *ex parte* with Judge Fitzpatrick about procuring Petitioner's prosecution.

THE COURT: That's Bill Prescott who has researched this.

MR. KIRWAN: I think that was the motion -- as I understand, they made a motion for recusal and then they made a motion for reconsideration of their motion for recusal and that's where it came to light in that civil case, but it was never brought up on the criminal case. And that's the reason why it was brought up because it was never mentioned in the criminal case.

THE COURT: But that was quite some time ago. The criminal case, ***there's never been an occasion, that I know of, for anything to be done other than for me to consider what was submitted by counsel.*** Of course, the lawyers who have been involved in the civil case have all been here during the criminal case.

MR. KIRWAN: Well, I'm not aware of that, Judge.

THE COURT: Well, I saw them in the Courtroom.

MR. KIRWAN: I'm sure if you saw them, they were there.

THE COURT: They certainly were here, twice. The case was tried twice.

MR. KIRWAN: Yes, I understand that. I haven't gotten the transcript of the final trial.

THE COURT: All I'm telling you is though, ***assuming that wasn't mentioned in the criminal case, that couldn't be newly discovered evidence based upon the commonality of counsel who have appeared in all these cases***[8]. Good gosh.

Mr. KIRWAN: Well, that's my understanding of the factual situation, Your Honor.

THE COURT: Well, I'll be glad to consider anything anybody wants to present because I would like to rule on this one last time.

MR. KIRWAN: That's all we have is what's before the Court now.

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[8] COUNSEL'S NOTE: In fact Judge Owens concealed his *ex parte* contacts with Judge Fitzpatrick throughout Petitioner's criminal case. None of Petitioner's criminal defense trial counsel who defended Watkins through two separate trials before Judge Owens have ever appeared in any of the civil cases in which Petitioner was involved, including McLendon in which Judge Fitzpatrick let slip the fact that he had first conferred with another judge (App. 2) before initiating Petitioner's prosecution.

THE COURT: Of course, there is a substantial question as to whether there's any relationship between the civil cases involving kaolin and the criminal case involving Robert Lee Watkins, as far as me being a presiding judge. I fail to perceive the alleged overlap in these cases. See, as the record will indicate, the only involvement of Robert Lee Watkins in the civil cases has been by virtue of the fact that he has been acting as the investigator and the agents for those parties based upon a contract to share in the proceeds. The only issue I had, which you referred to, was whether or not Robert Lee Watkins would have to submit to his deposition being taken and I decided that he would have to be

deposed; didn't decide anything else as to Robert Lee Watkins. Then the criminal case arose because of the depositions that were taken in the case that Judge Fitzpatrick had and that was when he concluded because of all the circumstances, that he was going to submit the matter to a Grand Jury which sent the matter to me, both civily -- I mean that case, civil, and then criminally because of Robert Lee Watkins. So, where is the connection between the civil litigation and the criminal litigation?

MR. KIRWAN: Well, I think that *the position of Mr. Watkins is is (sic) that the -- I believe it's the September 1987 status conference with Judge Fitzpatrick where he mentioned that he had had a conference with another Judge; that statement was not known to Mr. Watkins until some time in January of 1990, and that's what's in his affidavit, that that comment of Judge Fitzpatrick was not known to him, and therefore, the [pre-trial recusal] motion that Mr. Erion filed on the 455, did not have that as a basis for inclusion in that motion, which the Court denied. So therefore, that was new evidence that could indicate that this Court had a biased (sic), or if, in fact, because of the statements made by Judge Fitzpatrick, as to his position, and he has in our opinion correctly recused himself from those cases, our position is is that because of his statements concerning Mr. Watkins, that those statements from a disinterested layperson, if they were made to this*

Court would require recusal on this Court's part, just simply under the theory that the comments by Judge Fitzpatrick to Your Honor is just simply like the fruit of the poisonous tree. Once it gets out and once it -- it's kind of like poison ivy, once somebody touches it, it's like a tar baby, you just get stuck to it, and that would be our position.

THE COURT: All right, what's the difference in what you say is now newly discovered and the letters that Judge Fitzpatrick wrote explaining the basis for his recusal?

MR. KIRWAN: *Well, the difference in my opinion, Your Honor, is simply that he had a conference with another Judge; the details of that conference or what that conference entailed has never been made known or what was said or whether it was in any type of judicial proceeding or whether it was over a luncheon meal or coffee early in the morning. It's just simply this, 'I had a conference with another Judge,' and that, as far as we know, we don't know who that other Judge is, to be honest with you. The Court today has said, you know, that was Your Honor, but we don't have any indication of that from the record, as I understand it to be.*

THE COURT: Well, let me switch topics for a minute. *Are you suggesting that 28 U.S.C. 144 and 455 contemplates interrogatories being submitted to Judge Fitzpatrick and Judge Elliott?*

MR. KIRWAN: *Your Honor, we have no other -- I*

don't know any other way, I don't know of any procedure under a criminal case to obtain that information, short of a hearing, to have those Judges subpoenaed and come to a hearing. But our position is that the filing of this affidavit by Mr. Watkins, the affidavit on its face is sufficient under 144 to require recusal and therefore, this Court has to recuse itself and it is faced then with, who do you give the

motion to? You can't give it to Judge Fitzpatrick because he's already recused himself and our indications, or our information would be that Judge Elliott has also been tainted by this --

THE COURT: By receipt of a letter?

MR. KIRWAN: *Yes, and that's our position, and that therefore, he could not rule on the motion, so therefore, it has to go to someone outside the Middle District.*

THE COURT: *I see. Well, I have looked and I find no authority for interrogatories being submitted to a Judge under any circumstances.*[9]

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[9] COUNSEL'S NOTE: Judge Owens, Fitzpatrick, and Elliott, all the judges of the Middle District of Georgia, have steadfastly refused to answer any of the post-trial interrogations served by defense counsel seeking to discover the substance and full extent of all *ex parte* communications about Petitioner among all three judges. Judge Owens and Fitzpatrick have likewise absolutely refused to answer similar civil interrogatories served by plantiff's counsel pursuant to F.R. Civ. P. 33 respecting recusal motions filed respecting Judge Owens in the civil Cheeves and Gibson cases in which Petitioner is involved. Coincidentially, Judge Elliott of the Middle District has authored perhaps the most comprehensive opinion reviewing the reasons why federal judges are not *per se* immune to discovery procedures. *United States v. Cross*, 516 F. Supp. 700 (M.D. Ga. 1981), *rev'd* 708 F.2d 631 (11th Cir. 1983), *aff'd* 468 U.S. 1212 (1984). Indeed, the above-mentioned written interrogatories were served upon Judges Fitzpatrick, Owens and Elliott, rather than civil 8r criminal hearing subpoenas, precisely so as to avoid running afoul of the so-called "mental process rule" reviewed in *United States v. Cross, supra.*

MR. KIRWAN: I think in the proper -- maybe in a civil context there might be, but I would agree with Your Honor, under the criminal rules, I'm not aware of any --

THE COURT: No, civil either; not to the Judge as a presiding officer.

MR. KIRWAN: Well, not as a presiding officer, Judge --

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THE COURT: That's what -- we're not parties to a case, so we are presiding officers.

MR. KIRWAN: Well, I mean, Judge Fitzpatrick is no longer a presiding officer.

THE COURT: Well, that's true, but anyway, ***as a sitting Judge, I know of no authority in the federal system for there to be any discovery from the Judge as the Judge, unless he's a party to a case.***

MR. KIRWAN: I would agree with Your Honor; I don't know of any on the criminal side and I'm not that familiar on the civil side that whether or not that would be the situation. I would defer to the Court's knowledge in that area.

THE COURT: Well, I've looked. I just haven't found any, that's the reason I'm asking you.

MR. KIRWAN: Yes, sir. I was just trying to perfect the record in this case.

THE COURT: Well, I don't blame you as a lawyer, don't worry about that. That never bothered me. Well, what does the government have to say?

MR. McCOMMON: Your Honor, the government's position on this is much the same as what the Court has stated. My review of the motion and the affidavit indicates that it's things that were brought to light prior to trial in the motion to recuse, the motion that they filed for

prosecutorial misconduct, and the various other pretrial motions. It's things that were brought to the attention of the Court and that were heard earlier and there's nothing new. And the other comment that I would make is, regardless of whether Mr. Watkins in his affidavit may say what he's stating are objective, and that's often underlined, facts; the fact of the matter is they're things that he has testified to in trial and things that he as brought to light earlier, some of which was rejected by the jury during the course of the trial. But basically, that's the government's position. I don't see anything in there that's new, or taken when you know of the facts and here, I think, you know, something more than just the affidavit has to be considered when you consider everything on its face, the affidavit and motion don't state anything that would require this Court to send it somewhere else for a decision.

THE COURT: Well, Bruce, you might want to get with Charles because I think you will discover the case law clearly contemplates that if a further motion is filed, it has to be done by Charles.

MR. KIRWAN: All right.

THE COURT: Charles has got to come forth and make a good faith showing, I believe, on that, and if you want twenty-four hours to perfect it, that will be fine, before I do rule.

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MR. KIRWAN: If I could, Your Honor, yes sir. I'll try to have that.

THE COURT: ***But now, my present research indicates that everything that has happened in this case, and my present knowledge, has been as a result of my duties as a trial judge. There's nothing that I know of that indicates that I have any personal bent or bias against Robert Watkins.*** As I recited before, I didn't even know Robert Watkins until he came to the criminal case. He never even appeared with counsel in the middle of the civil cases and, of course, during the criminal case, as you will see from the transcript that Frances says she's going to file today, that it was never an issue in that case except factual to the jury. There wasn't even any dispute over the charge. So, it was just a straight, plain old perjury case

submitted to twelve people who decided to convict him. I never had to decide anything, when you get right down to it.[10]

MR. KIRWAN: Well, Judge, if you would give me twenty-four hours, just so I could perfect that part of it.

THE COURT: Sure, no problem, be glad for you to.

MR. KIRWAN: Judge, there's one other thing, if I could just mention off the record?

THE COURT: Sure.

CONFERENCE CONCLUDED.

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[10] COUNSEL'S NOTE: None of the language of Judicial Canons 3A(4)(*ex parte* communication prohibition) and 3C(1) ("impartiality reasonably questioned) nor 28 U.S.C. §§ 144 or 455(a) & (b), nor *Liljeberg, supra,* suggest any difference in a judge's recusal obligatious dependent upon the jury or non-jury nature of the proceeding.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

UNITED STATES OF AMERICA	:
	:
VS.	: CRIMINAL NO. 89-46-MAC
	: (WDO)
ROBERT LEE WATKINS,	:
Defendant.	:

ORDER

Before the court is defendant Robert Lee Watkins' second motion for recusal, submitted pursuant to 28 U.S.C. §§ 144 and455.[1] Defendant has also filed a motion for a new trial. Although defendant's present motion for recusal is largely a rehash of arguments put before this court in defendant's original motion for recusal, the court will proceed to address defendant's latest motion.

> Title 28 U.S.C. § 144 provides:
> whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding ....

[1]Defendant's counsel filed an earlier motion asking that this judge recuse himself from presiding further over defendant's trial for perjury which as considered by the court even though the supporting affidavit required by 28 U.S.C. § 144 was not filed and the motion was submitted by counsel and not defendant.[11]

[11] COUNSEL'S NOTE: See next page.

However, the trial judge need only recuse himself if he determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable man that the trial judge harbored a personal, as opposed to a judicial bias, against the movant. *United States v. Dansker, 537 F.2d 40 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (1977).*

The allegations set forth in defendant's affidavit in support of his motion for recusal, merely cite to this court's rulings and comments in other cases in which defendant has an interest and are insufficient to establish a basis for recusal. *United States v. Partin, 312 F.Supp. 1355 (E.D. La. 1970).* In order for facts set out in an affidavit in support of recusal to be legally sufficient to require recusal of the judge, the facts must show that the alleged bias is personal as opposed to judicial in nature. *United States v. Serrano, 607 F.2d 1145, rehearing denied, 612 F.2d 579 (5th Cir. 1980), cert. denied, 445 U.S. 965 (1980).* ***"Judicial activity," for purposes of determining whether alleged bias of court required for recusal is extrajudicial, includes***

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[11] COUNSEL'S NOTE: The record below conclusively shows that Petitioner's ***pre-trial*** recusal motion was filed exclusively under 28 U.S.C. § 455(a) such that no supporting affidavit of Petitioner was required. Defense counsel therefore first invoked 28 U.S.C. § 144, supported by Petitioner's 32-page Affidavit of Bias and Prejudice and 22 documentary exhibits, in Petitioner's ***post-trial*** recusal and new trial motion in a vain effort to force referral of Petitioner's facially sufficient recusal motion to another judge under the mandate of Section 144. Notwithstanding the 144 motion's facial sufficiency, Judge Owens kept it and denied it himself with the above order.

participation in and statements made at in-chambers conferences.[12] *Resident Advisory Board v. Rizzo, 510 F.Supp. 793 (E.D. Pa. 1981).* ***None of the statements cited in defendant's affidavit show any personal bias or prejudice on the part of this judge against defendant Watkins. Thus, insofar as defendant's affidavit in support of recusal relies on***

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[12] COUNSEL'S NOTE: The cited authority refers to in-chambers, non-*ex parte* exchanges with counsel. Petitioner's counsel has found no federal case which has ever sanctioned secret, *ex parte* communications between two federal district judges, the object of which is the indictment, prosecution, and conviction of a defendant with one judge acting as accuser and the other as trial judge in direct violation of Judicial Canon 3A(4).

The "Star Chamber" character of Judge Owens and Fitzpatrick's admitted "in-chambers conferences" (App. 37) and "oral communications" (App. 38) about Petitioner's prosecution is somewhat analogous to the "one-man grand jury practice" and secrecy condemned in this Court's decision in *In re Oliver*, 333 U.S. 257 (1948). Therein the Court observed that "[w]hatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution". Id. at 270 (footnote omitted). But the guarantee of a public trial is scant consolation to a criminal defendant who has already been tried and convicted in absentia as in the mind of his trial judge through secret *ex parte* communications between his accuser and his trial judge—the Fifth Amendment, Judicial Cannons 3A(4) and 3C(1), and 28 U.S.C. § 144 and 455(a) & (b) notwithstanding.

statements made by this court during in-chambers conferences [with Judge Fitzpatrick], it is legally insufficient.

Defendant also seeks to show that this judge is personally biased or prejudiced against him by pointing to a letter sent to him by Judge Duross Fitzpatrick in which Judge Fitzpatrick recused himself from presiding over certain civil matters [McLendon v. Georgia Kaolin Company] in which defendant has an interest. Inasmuch as this judge received a copy of the above-referenced letter as part of his ***judicial administrative function, it does not constitute information received from an extrajudicial source and is therefore insufficient to warrant this judge's recusal.*** Moreover, to the extent the letter contains statements made by Judge Fitzpatrick evidencing bias against defendant, such bias cannot be imputed to this judge. Nothing in the letter referenced above points to any personal bias or prejudice on the part of this judge against defendant.

Furthermore, any oral communications this judge had regarding the case in question were of a judicial nature and do not evidence any personal bias on the part of this judge against defendant Watkins. Defendant Watkins' affidavit does not cite any facts which demonstrate that this court has any personal bias or prejudice against defendant. Consequently, defendant's motions for recusal and a new trial are DENIED.[13]

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[13] COUNSEL'S NOTE: The most notable feature of Judge Owens' above-quoted order is that it totally avoids, as did the Eleventh Circuit's panel opinion (A 40, *infra*) the *ex parte* prohibition of Judicial Canon 3A(4) and, of course, whether the judges' violations of Canon 3A(4) vis-a-vis Petitioner represent *per se* objective facts under which both judges' "impartially might reasonably be questioned "under Canon 3C(1), 28 U.S.C. §§144 and 455(a) & (b) and *Liljeberg, supra* Table of Contents at iii.

SO ORDERED,[2] this 23rd day of March, 1990.

/S/ Wilbur D. Owens, Jr.

WILBUR D. OWENS, JR.

UNITED STATES DISTRICT JUDGE

WTP:lab

[2]In spite of the fact that defendant's motion and affidavit are untimely, do not show good cause for failure to file within the required time, and are filed for a second time, the court has considered the same and has further carefully considered whether anything known to this judge is the basis for his recusal under 28 U.S.C. §§ 144 or 455. Knowing of nothing that could possibly require recusal, this order is signed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8317

D.C. Docket No. CR-89-46-MAC(WDO)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LEE WATKINS,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(December 7, 1990)

Before KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

PER CURIAM:

*Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Robert Lee Watkins appeals his conviction of aiding and abetting a witness to testify falsely in violation of 18 U.S.C. §§ 1623 and 2. Appellant claims on appeal that the testimony at issue, although admittedly perjured, was not material. This claim is frivolous.

Appellant also argues that the district judge erred in declining to recuse himself and in declining to refer the recusal decision to another judge pursuant to 28 U.S.C. §§ 144. After a careful review of the record, we conclude that the district judge did not abuse his discretion.

The letter dated July 11, 1989 conveyed certain information relating to the previous judge's decision to recuse himself. The district judge in this case received that information in his judicial capacity, i.e., as the chief judge of the district with responsibility for reassigning the case. ***Thus, the district judge acquired that knowledge in his judicial capacity and not in an extra-judicial capacity.*** Moreover, there is nothing in the letter which indicates bias on the part of the district judge; the letter indicates bias only on the part of the previous judge on account of which he recused himself.

Appellant also asserts that the district judge in this case was biased as a result of conferring with the previous judge. Taking all

reasonable inferences favorable to appellant, the context of the alleged[14] conference is as follows: The previous judge, while presiding in a civil case, conferred with his chief judge concerning the appropriate procedure when he suspected that

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appellant had aided and abetted perjury. The procedure which was in fact followed (and therefore ***may have been discussed*** with the chief judge in the alleged conference) was to refer the matter to the appropriate authorities for possible prosecution and to stay the civil case. ***Thus, any information conveyed at the alleged conference was received by the district judge, i.e., the chief judge, in his judicial capacity and not in an extra-judicial capacity. Moreover, nothing in the information which could reasonably have been received by the district judge would indicate disqualifying bias on the part of the judge.***[15]

The other assertions of bias on the part of the district judge are wholly without merit and warrant no discussion.

AFFIRMED.

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[14] COUNSEL'S NOTE: The foregoing appendix excerpts demonstrate conclusively that the admitted *ex parte* "in-chambers conferences" and "oral communications" concerning Petitioner (App. 37-38) were anything but "alleged".

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[15] COUNSEL'S NOTE: On account of the judges' continued concealment and supprssion of the actual substance and extend of all their

[15] COUNSEL'S NOTE (continued): admittedly *ex parte* "in-chambers conferences" and "oral communications", even before the Eleventh Circuit, we find the panel indulging its ***"may have been"*** speculation and presumptions in favor of the judges, ***not Petitioner***, and as did Judge Owens' Order (App. 34-39) totally avoiding the recusal issues joined by 18 separate citations to Judicial Canons 3A(4) and 3C(1) and 28 U.S.C. § 455(a) in Petitioner's main and reply briefs before the Eleventh Circuit. Never answered by the panel of a the Eleventh Circuit is whether Judge Owens' impartiality under the undisputed objective facts established by Judge Owens' own eventual admissions (assuming he finally spoke the truth) might reasonably be questioned under 28 U.S.C. 455(a) and Liljeberg, much less Judicial Canons 3A(4) and 3C(1).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8317

UNITED STATES OF AMERICA,

Petitioner-Appellee,

versus

ROBERT LEE WATKINS,

Respondent-Appellant.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion December 7, 1990, 11th Cir., 19__, ____F.2d____
Before: KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.
PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ R. Lanier Anderson

UNITED STATES CIRCUIT JUDGE

*Hon. Seybourn H. Lynne, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

28 U.S.C. § 372(c); Judicial Discipline (as amended effective March 1, 1991)

(c)(I) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons may -

> (A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or
>
> (B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of his written order to the complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly -

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph.

A judge appointed to a special committee under this paragraph may continue to serve on the committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council -

(A) may conduct any additional investigation which it considers to be necessary;

(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;

(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;

(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;

(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;

(v) censuring or reprimanding such judge or magistrate by means of private communication;

(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or

(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7)(A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior may have engaged in conduct —

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or

(ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8)(A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(9)(A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that —

> (A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;
>
> (B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and
>
> (C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that-

(A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by the spacial committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under Article I of the Constitution; or

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 881 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Claims Court, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

No. 91-184

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT LEE WATKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district judge properly denied petitioner's recusal motions on the ground that communications between judges regarding the administration of the district court are judicial in nature and do not demonstrate personal bias.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A40-A42) is unreported, but the judgment is noted at 921 F.2d 285 (Table). The memorandum order of the district court (Pet. App. A34-A39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1990. A petition for rehearing was denied on April 4, 1991. Pet. App. A44-A45. The petition for a writ of certiorari was filed on July 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on one count of inducing a witness to testify falsely, in violation of 18 U.S.C. 1623. The district court sentenced petitioner to a five-year term of imprisonment and a $50,000 fine. The court of appeals affirmed.

1. Petitioner was a named defendant and a representative for other defendants (known generally as the Carter heirs) in *Tarbutton* v. *The Carter Place*, 641 F. Supp. 521 (M.D. Ga. 1986), an action to quiet title to approximately 585 acres of land in Washington County, Georgia. The Carter heirs claimed that Esther Scott, now known as Esther Scott Hinton (a predecessor in interest to the Carter heirs), had not in fact signed a recorded deed dated January 31, 1938, purporting to convey an interest in the property in question from Scott to B.J. Tarbutton. The Carter heirs supported their claim with testimony by Scott, stating that she did not sign the deed, as well as testimony at a deposition by one Charles E. Williams of Taylor, Michigan, stating that he was the notary public of that name who signed the deed as witness in 1938, that he did so in Sandersville, Georgia, at the behest of B.J. Tarbutton, that he was not a notary public at the time, and that neither Scott's signature nor the signature of the other witness, Maude Williams, was on the document at the time he signed it. 641 F. Supp. at 524-525, 528-529.

The district court found Williams' testimony "incredible" because Williams did not recall anything about Sandersville, Georgia, other than signing the Tarbutton deed as a teenager; because school records showed Williams was enrolled in Kentucky schools,

not Georgia schools, at the time the deed was signed; and because the plaintiffs produced evidence that a deceased attorney named Charles E. Williams was a notary public who had been married to a Maude Williams. *Id.* at 528-529.

Because the trial judge (Judge Fitzpatrick) believed that petitioner might have aided and abetted perjury in securing Williams' testimony, he consulted with Chief Judge Owens regarding what to do. The two judges agreed that the proper response was for Judge Fitzpatrick to refer the matter to the appropriate authorities and to stay the civil case. See Pet. App. A42.[1]

2. After a grand jury indicted petitioner for inducing Williams' false testimony in the *Tarbutton* deposition, the criminal case was assigned to Chief Judge Owens. On October 27, 1989, petitioner filed in the district court a pretrial motion seeking the recusal and disqualification of Judge Owens under 28 U.S.C. 455(a) on three grounds. The recusal claim arose from three incidents that occurred in civil cases involving rights to kaolin, a white clay used in manufacturing ceramics and other products. In those cases, as in the *Tarbutton* matter, petitioner acted as an investigator and representative for persons claiming interests in land that contained kaolin. First, petitioner claimed that in a June 30, 1989, hearing Judge Owens stated that he was "familiar with the circumstances" that had caused petitioner's indictment. See Oct. 27, 1989, Mot. for Recusal 1.[2] Second,

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[1] The court ultimately granted summary judgment against the Carter heirs. 641 F. Supp. at 535-536.

[2] Petitioner also unsuccessfully sought Judge Owens' recusal in a related civil case, *Cheeves* v. *Southern Clays, Inc.*, 726 F. Supp. 1579 (M.D. Ga. 1990). Judge Owens pointed

petitioner cited a letter dated July 11, 1989, from Judge Fitzpatrick to petitioner's counsel, Franklin Nix. In the letter, Judge Fitzpatrick informed Nix that he was recusing himself from cases involving petitioner because he was biased against petitioner and would not believe petitioner under oath. Judge Fitzpatrick stated that he understood that Judge Elliott would handle the civil case. Judge Fitzpatrick indicated in the letter that Judge Owens, as chief judge of the district court, was being sent a courtesy copy of the letter. *Id.* at 2. Petitioner's final basis for recusal was Judge Owens' alleged statement in a September 27, 1989, civil hearing that "[petitioner's] situation was unique; that [petitioner] had been assigned an interest in [other land actions similar to the *Tarbutton* case]; and that he was either a party or a virtual party to the cases." *Id.* at 3.

Judge Owens denied the recusal motion at a November 1, 1989, hearing. See Pet. App. A5-A9. He explained that petitioner had been indirectly involved in a number of civil cases in his court and that accordingly he was familiar with petitioner's activities in those cases. He also acknowledged his awareness of Judge Fitzpatrick's recusal and the July 11 letter, but concluded: "I know of nothing that would suggest to anybody that I have any personal bias or prejudice." *Id.* at 7a.

After petitioner had been convicted, his counsel filed a second recusal motion on March 19, 1990, relying on 28 U.S.C. 144 and 455(a). In addition to the matters described above, petitioner relied on Judge Fitzpatrick's statement in a September 29, 1987, hear-

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out that he knew about petitioner's indictment two months before the civil hearing because the criminal case had been assigned to him at that time. *Id.* at 1582.

ing in a kaolin case involving petitioner that after a "conference with another judge" he thought a stay of proceedings in that case would be appropriate because of "something pending in a related suit." Petitioner alleged that the other judge was Judge Owens, and that Judge Owens' failure to disclose the conference demonstrated that he was biased against petitioner. See Mar. 19, 1990, Mot. for Recusal 14-15; Pet. App. A2.

Judge Owens denied the motion. Pet. App. A34-A39. He noted that recusal would be proper only if petitioner could show some personal bias, and that petitioner's filings cited only prior rulings of the court and "comments in other cases in which defendant has an interest." *Id.* at A35. He also rejected petitioner's argument that his discussions with Judge Fitzpatrick demonstrated personal bias. He reasoned (*id.* at A35-A37):

> "Judicial activity," for purposes of determining whether alleged bias of court required for recusal is extrajudicial, includes participation in and statements made at in-chambers conferences. * * * [I]nsofar as [petitioner's] affidavit in support of recusal relies on statements made by this court during in-chambers conferences, it is legally insufficient.

Finally, Judge Owens rejected (*id.* at A37) petitioner's contention that Judge Owens was biased because of his receipt of Judge Fitzpatrick's letter of recusal. Judge Owens stated that he had received the letter "as part of his judicial administrative function," and that any bias by Judge Fitzpatrick against petitioner could not be imputed to Judge Owens. *Ibid.*

3. The court of appeals affirmed in an unpublished per curiam opinion (Pet. App. A40-A42). First, it rejected petitioner's reliance on Judge Fitzpatrick's

recusal letter, both because Judge Owens received the letter in his capacity as chief judge of the district court responsible for reassigning the case, and because the letter did not demonstrate bias on Judge Owens' part. *Id.* at A41. As to petitioner's claim that Judge Owens was biased because he had conferred with Judge Fitzpatrick, the court of appeals concluded that the most that could be said was that a district court judge conferred with his chief judge concerning the appropriate steps to take when he believed a party had aided and abetted perjury in his court. As in the case of the letter, the court held, the consultation incident could not form the basis for recusal because it was entirely judicial, and because it showed no bias on the part of Judge Owens. *Id.* at A42.

ARGUMENT

1. Petitioner first contends (Pet. 19-25) that Judge Owens' failure to recuse himself was contrary to applicable federal statutes. Federal law contains two statutes that require disqualification of a judge for bias or prejudice. Under the first of these, 28 U.S.C. 144, a party to a proceeding may file an affidavit alleging that the district court judge assigned to the matter "has a personal bias or prejudice either against him or in favor of any adverse party." If the affidavit is timely and "sufficient," the judge may not proceed further in the case, and another judge is assigned to hear the proceeding. To be sufficient, the affidavit must allege personal rather than judicial bias, that is, bias that arose from the judge's background and associations, not from his experience as a judge. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Easley* v. *University of Michigan Bd. of Regents*, 853 F.2d 1351, 1356 (6th Cir. 1988).

Moreover, the affidavit must allege actual bias, not merely the appearance of bias. See, *e.g.*, *In re Faulkner*, 856 F.2d 716, 720 n.6 (5th Cir. 1988).

The second statute, 28 U.S.C. 455, is self-executing: if its provisions apply, the judge must recuse himself whether or not a party files a request that he do so. See *Easley* v. *University of Michigan Bd. of Regents*, 853 F.2d at 1356. Subsection (a) provides that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Unlike Section 144, Section 455(a) establishes an objective standard: the question is whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. See, *e.g.*, *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860-861 (1988).[3] Subsection (b) then lists specific circumstances in which a judge is required to recuse himself; the only one of arguable relevance here is set forth in subsection (b)(1), which requires recusal "[w]here [the judge] has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Like Section 144, this Section establishes a subjective standard and applies only if the bias is "personal" or "extrajudicial" in nature; "what a judge learns or comes to believe in his judicial capacity 'is a proper basis for judicial observations, and the use of such information is not the kind of matter that

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[3] See also *United States* v. *Devine*, 934 F.2d 1325, 1348 (5th Cir. 1991); *United States* v. *Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990); *United States* v. *Nelson*, 718 F.2d 315, 321 (9th Cir. 1983).

results in disqualification.' " *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988), cert. denied, 490 U.S. 1102 (1989); see *United States* v. *Coven*, 662 F.2d 162, 167-168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982); 13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3542, at 556-576 (2d ed. 1984).

Petitioner has failed to demonstrate any personal bias on the part of Judge Owens sufficient to justify recusal under 28 U.S.C. 144 or 455(b)(1). He does not cite a single statement by Judge Owens that justifies a belief that Judge Owens has a personal animus against petitioner. Nor is there anything in the record to suggest that Judge Owens has been misleading or less than forthcoming regarding his conversations with Judge Fitzpatrick. Whatever view Judge Owens may have acquired in his conversations with Judge Fitzpatrick as to petitioner's reputation for veracity was received in his capacity as chief judge of the district court. There is no need for this Court to review the court of appeals' entirely reasonable conclusion that the receipt of this information need not be presumed to create the kind of bias that requires recusal under Section 144 or 455(b).

Petitioner fares no better in his attempt to establish an objective appearance of partiality within the meaning of 28 U.S.C. 455(a). Judge Owens learned of petitioner's situation only because, as chief judge of the district court, he was responsible for assigning cases within the district. There is no indication that he learned anything more than that petitioner might have aided and abetted a witness's perjury in Judge Fitzpatrick's courtroom and that Judge Fitzpatrick recused himself from one of petitioner's civil cases on the ground of bias. This is nothing more than

Judge Owens learned from the indictment in this case and the facts of Judge Fitzpatrick's recusal. No reasonable person with knowledge of all the facts would conclude that Judge Owens' impartiality might reasonably be questioned on these grounds.[4]

Petitioner's suggestion (Pet. 20-21) that the decision below conflicts with numerous decisions of other circuits is incorrect. As petitioner himself acknowledges (Pet. 22), "none of these decisions have addressed the disqualifying effects of *ex parte* communications between fellow judges." Of the three cases on which petitioner relies most heavily, the first, *In re Paradyne Corp.*, 803 F.2d 604 (11th Cir. 1986), involved a district court's plan to interview defendants, counsel, and witnesses *ex parte* and *in camera* to determine whether there was a conflict in the case; the court of appeals held that the district court should have followed established procedure and held an examination in open court to question defendants as to the existence of conflicts of interest. The second, *Price Bros. Co.* v. *Philadelphia Gear Corp.*, 629 F.2d 444

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[4] In any event, petitioner would not necessarily be entitled to a new trial even if petitioner were correct that Judge Fitzpatrick's communication with Judge Owens created an appearance of partiality under 28 U.S.C. 455(a). As this Court explained in *Liljeberg*, 486 U.S. at 864, "in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." In this case, petitioner has failed to show any way that Judge Owens' alleged appearance of partiality affected the proceedings; indeed, the only other issue raised on appeal was a legal question as to the materiality of the false testimony, on which the court of appeals found the district court's ruling to be clearly correct. See note 5, *infra*.

(6th Cir. 1980), involved ex parte observations of evidence by a judge's law clerk. The third, *United States* v. *Earley*, 746 F.2d 412 (8th Cir. 1984), cert. denied, 472 U.S. 1010 (1985), involved papers provided to a court by a party who failed to serve counsel for the other party.

2. Petitioner contends (Pet. 25-28) that Judge Owens' conduct violated Canon 3A(4) of the Code of Judicial Conduct, 69 F.R.D. 273 (1975). Canon 3A(4) bars ex parte communications regarding a pending or impending proceeding. 69 F.R.D. at 275. The commentary explains, however, that the Canon "does not preclude a judge from consulting with other judges, or with court personnel whose function it is to aid the judge in carrying out his adjudicative responsibilities." *Id.* at 276. Although petitioner quotes (Pet. 8) the reporter's notes to this Canon as suggesting that "[a] judge who has * * * given advice about the issues in a proceeding has put his impartiality in jeopardy," the quoted language is inapposite here. As the court of appeals explained, see Pet. App. A42, the communications between Judge Owens and Judge Fitzpatrick related not to the merits of any civil or criminal case, but to the procedures to be followed in responding to a party's possible attempt to present false evidence. Petitioner does not cite, and we are not aware of, any case that interprets the Canon in a way that would cast doubt on the actions of the judges in this case. Rather, because of Judge Owens' administrative responsibilities, his role was the legitimate one of "court personnel whose function it is to aid the judge [here Judge Fitzpatrick] to carry out his adjudicative responsibilities." Thus, Judge Owens did not "giv[e] advice about the issues in a proceeding" in the sense intended by the reporter. See Canon

3B(1) of the Code of Judicial Conduct, 69 F.R.D. at 276 ("A judge should diligently discharge his administrative responsibilities * * * and facilitate the performance of the administrative responsibilities of other judges and court officials."); *In re Aetna Casualty & Surety Co.*, 919 F.2d 1136, 1145 (6th Cir. 1990) (en banc) (judge who recuses himself is permitted to perform duties necessary to transfer case to another judge); *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1024-1025 (9th Cir. 1981) ("[W]e refuse to construe the word 'proceeding' [in 28 U.S.C. 455(b)(1)] to include the performance of ministerial duties such as assigning a case to another judge."), aff'd for absence of a quorum, 459 U.S. 1190 (1983).[5]

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[5] Petitioner also relies (Pet. 8, 9, 15, 17) on Canon 3C of the Code of Judicial Conduct. The obligations created by that provision are incorporated in 28 U.S.C. 455(b)(1) by the use of the reference to "personal" bias. See *United States* v. *Coven*, 662 F.2d 162, 167-168 (2d Cir. 1981), cert. denied, 456 U.S. 916 (1982). For the reasons stated above, petitioner has not established that Judge Owens violated that provision.

Petitioner also lists as an issue (Pet. iv) the question whether Williams' false testimony was material, but he presents no argument on the merits of that contention, which in any case is meritless. The test for determining the materiality of testimony is whether the testimony "was capable of influencing the tribunal on the issue before it." *United States* v. *Cuesta*, 597 F.2d 903, 921 (5th Cir.), cert. denied, 444 U.S. 964 (1979). The test applies even if the testimony "[is] not ultimately dispositive of the issue" before the court. *United States* v. *Molinares*, 700 F.2d 647, 654 (11th Cir. 1983). The court of appeals correctly held that petitioner's contention that the testimony was not material was "frivolous," Pet. App. A41. The main issue in *Tarbutton* was the claim of title to property established in part by the Esther Scott deed. The perjured testimony consisted of false statements as to the validity of the Esther Scott signature, which, if believed, could have led to invalidation of the deed. The fact that the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

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district court decided under the doctrine of laches that Scott could not challenge her signtaure 45 years after the document was signed does not lessen the materiality of the false testimony presented by Williams.

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